Supreme Court, U.S.
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No. 99-1345

In The

Supreme Court of the United States

EDWARD DiLORETO,

Petitioner,

v.

BOARD OF EDUCATION OF THE DOWNEY UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD DI LORETO Plaintiff, v. EDWARD SUSSMAN, BETTY FERRARO, and MARGO HOFFER, Defendants.	Case No. CV 97-4028 CM **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION** (Filed Aug. 26, 1998)

The Court, having considered the parties' papers, all admissible evidence filed in support thereof, and without oral argument, hereby **grants** Defendants' Motion for Summary Judgment and **denies** Plaintiff's Motion for reconsideration of Order Denying Plaintiff's Motion for Summary Judgment.

I.

FACTUAL BACKGROUND

Plaintiff Edward Di Loreto has brought the instant action against the superintendent of the Downey Unified School District (the "District"), Edward Sussman, and two members of the District's Board of Education (the "Board"), Betty Ferraro and Margo Hoffer (collectively

"Defendants").[1] Mr. Di Loreto seeks injunctive, declaratory relief, and damages as a result of Defendants' refusal to post a sign paid for by Mr. Di Loreto that included the text of the Ten Commandments.

In or about September 1995, Downey High School Principal Allen Preston Layne gave the Downey High School Baseball Booster Club (the "Booster Club") permission to solicit paid advertising to be posted at the outfield fence of the Downey High School baseball field (the "outfield fence"). The Booster Club offered to post four-foot-by-eight-foot advertising signs on the outfield fence for a one-time fee of $400 and an annual fee of $100 to maintain the sign thereafter.

On December 26, 1995, Mr. Di Loreto agreed to purchase a spot on the outfield fence and submitted the design he wished to post, which included the Ten Commandments as they appear in the Old Testament of the Bible.[2] Mr. Di Loreto, who owns a business called Yale

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[1] All three Defendants are sued in their individual and official capacities.

[2] In addition to the Ten Commandments, the text of the proposed sign included the following:

> For a Peaceful World!!
>
> Throughout the ages rules and governments have tried in vain to achieve PEACE ON EARTH. They have tried wars, written hundreds of thousands of laws, rules and regulations in an effort to control the behavior of man and always failed.
>
> Unto This Day!
>
> Wars, Bitterness, starvation, and hatred continue unabated. When and how did we lose our way? Can it be that it was when we turned away from the

Engineering, paid the Booster Club $400 to post his sign. Because of the religious content of Plaintiff's sign, the Booster Club referred the matter to Principal Layne. In January 1996, a member of the Booster Club worked with Mr. Di Loreto to develop a new sign which also included the Ten Commandments.[3]

Principal Layne denied approval of the sign.[4] Approximately three to four months later, Superintendent

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teachings and laws of GOD? Let's ponder over and read what the Lord has said for us to Obey!

The world can be saved if we begin in the beginning. When a child is born and throughout the formative years, teach the laws of God. They will grow and become better humans and respect and love one another. More laws will not improve this world. Each new law is a challenge to the evil ones. They will find a way to circumvent them. More laws are then required and the cycle never ends. God's Commandments are so simple to follow and people will certainly improve, generation after generation. Do we posses [sic] the will to OBEY? And teach tem [sic] to all?

Edward and Jill Di Loreto Family

[3] In addition to the Ten Commandments, Plaintiff's second proposed sign included the following text:

"For Peace in Our Day!

Pause & Meditate on these Principles to Live By! . . . [The Ten Commandments] . . .

To earn respect for ourselves and our community we must do noble acts for the love of God & concern of our country!

Edward and Jill Di Loreto Family Trust"

[4] Mr. Di Loreto argues that Mr. Layne acted based on the religious content of the sign. Mr. Layne has testified that he acted because of concern over the separation of church and state; potential disruptions due to anticipated media and

Sussman ratified Mr. Layne's decision not to post Mr. Di Loreto's sign and to return Mr. Di Loreto's $400 check. In or about May 1996, Mr. Sussman met with Board Members Ferraro and Hoffer, and maintained the decision not to allow Mr. Di Loreto's sign to be erected on the baseball field. On October 3, 1996, under advice of counsel, the District removed all signs on the baseball field that had been posted pursuant to paid advertising agreements with the Booster Club. For approximately seven months until the program was terminated in October 1996, approximately 40 advertising signs were posted at the baseball field and Mr. Di Loreto's sign was not among them.

On September 13, 1996, the Office of the attorney General of the State of California issued an opinion (the "Attorney General opinion") on the issue. The attorney general opinion concluded, "If a school district sells commercial advertising space on a fence surrounding its high school baseball field, it may not refuse to accept an otherwise appropriate advertisement which contains the Ten Commandments and clearly identifies the advertising party."

In a hearing on May 11, 1998, this Court denied Mr. Di Loreto's motion for summary judgment, finding that the baseball field is a nonpublic forum, the District's decision to exclude Mr. Di Loreto's sign was reasonable,

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community attention; additional disruptions or controversies that might arise from religious or political statements that others might wish to post in response or in addition to Mr. Di Loreto's sign; and anticipated lawsuits from community members seeking to have the sign removed.

and erecting the sign would have violated the Establishment Clause of the First Amendment. The Court revisits these issues in the context of Mr. Di Loreto's motion for reconsideration and Defendants' motion for summary judgment.

Mr. Di Loreto also filed a related state-court action captioned, *Edward Di Loreto v. Downey Unified School District Board*, Case No. VC 024435 (the "state-court action"). On June 1, 1998, Hon. Thomas I. McKnew, Jr. of the Superior Court of California, County of Los Angeles, issued an order granting the District's motion and denying Mr. Di Loreto's motion for summary judgment. The Superior Court found that the outfield fence was a non-public forum, the District's decision to reject Mr. Di Loreto's sign was reasonable, and if the District had posted Mr. Di Loreto's sign it would have violated the Establishment Clause.

II.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a trilogy of 1986 cases, the Supreme Court clarified the applicable standards for summary judgment. *See Celotex Corporation v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242 (1986); *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson*, 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative, admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence submitted by the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient to create a genuine issue of material fact. *Id.* at 252. As the Supreme Court explained in *Matsushita*,

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

Id., 475 U.S. at 586-87.

To be admissible for purposes of summary judgment, declarations or affidavits must be based on personal knowledge, must set forth "such facts as would be admissible in evidence," and must show that the declarant or affiant is competent to testify concerning the facts at issue. Fed. R. Civ. P. 56(e). Declarations on information and belief are insufficient to establish a factual dispute for purposes of summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Summary judgment is not treated as "a disfavored procedural shortcut" but as "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. Analysis

1. Plaintiff Is Estopped from Relitigating the Claims and Issues Decided in the State-Court Action

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or the privies from relitigating issues that were or could

have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The doctrine serves to impose finality in litigation, thereby "conserv[ing] judicial resources, protect[ing] litigants from multiple lawsuits and foster[ing] certainty and reliance in legal relations." *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980).

The record of a judgment in state court is entitled to "full faith and credit" in federal court. 28 U.S.C. § 1738. Section 1738 helps to minimize multiple litigation, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on final judgments. *See Allen v. McCurry*, 449 U.S. 90, 96 (1980). Res judicata, or claim preclusion, absolutely bars a subsequent lawsuit if the prior adjudication: (1) involved the same parties or their privies; (2) reached a final judgment on the merits; and (3) involved the same claim. *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

Under the related doctrine of collateral estoppel, or issue preclusion, an issue previously adjudicated may not be relitigated if: (1) the issue necessarily decided in the prior litigation is identical to the issue sought to be relitigated; (2) the decision in the prior litigation was final and on the merits; and (3) the party against whom preclusion is sought is the same as, or in privity with, the party to the prior litigation. *See Housing authority of the City of Los Angeles v. Workers' Compensation Appeal Bd.*, 60 Cal. App. 4th 1076, 1082 (1998).

Although neither party has discussed these doctrines, all the elements appear to be present in this case. As far as the Court can tell from the state court order, Mr.

Di Loreto raised the same claim in state court as he raises here, alleging that his rights to free speech and free exercise of religion were abridged by the District's decision not to post his sign. The Superior Court dismissed Defendants Sussman, Ferraro and Hoffer – the same individuals named herein – on the grounds of state governmental immunity. The court then dismissed the free speech and free exercise claims as against the District on the grounds that posting the sign would have violated the Establishment Clause, and that the District's regulation of the outfield fence, a nonpublic forum, was reasonable.

Even if the claims or parties differed slightly in state court,[5] the issues decided in the Superior Court's order of June 1, 1998, are the same as those presented here. As such, having obtained an adjudication on the merits, Mr. Di Loreto appears to be estopped from bringing the instant action for alleged violation of his rights to free speech and free exercise of religion. Nevertheless, because the parties have not briefed the issue or provided the Court with all of the relevant pleadings and documents from the state-court action, and out of an abundance of caution, the Court will address the merits of Mr. Di Loreto's claim.

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[5] The parties have not filed with this court a copy of Mr. Di Loreto's complaint in the state-court action.

2. Posting Mr. Di Loreto's Sign Would Violate the Establishment Clause.

The District asserts as a defense to its action that posting Mr. Di Loreto's proposed sign would have violated the Establishment Clause of the First Amendment. The First Amendment provides, "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. Under the Fourteenth Amendment, the Establishment Clause applies equally to state and local governments. A policy does not offend the Establishment Clause if it passes the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion."

Defendants assert that posting Mr. Di Loreto's sign would violate the first two prongs of the *Lemon* test. With respect to the first prong, Defendants rely on *Stone v. Graham*, 490 U.S. 39 (1980). In *Stone*, the Supreme Court held that a Kentucky statute requiring the Ten Commandments to be posted in all classrooms in the state violated the Establishment Clause. *Id.* at 42. The Court found that the "pre-eminent purpose for posting the Ten Commandments on school room walls is plainly religious in nature." *Id.* at 41. Notwithstanding a "legislative recitation of a supposed secular purpose" in the text of the statute, the Court stated that posting the Ten Commandments "has no secular legislative purpose, and is therefore unconstitutional under the first prong of the *Lemon* test. *Id.* Finally, the Court noted, "It does not matter that

the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits." *Id.* at 42.

Mr. Di Loreto argues that *Stone* is inapposite because it involved a statute requiring the posting of the Ten Commandments in every classroom in the state.[6] Mr. Di Loreto asserts that the relevant government action here is the Booster Club's advertising program, which was intended for the secular purpose of raising money for school athletic programs. Defendants argue that the relevant governmental act was the District's ad hoc policy decision not to post Mr. Di Loreto's sign.

The Court finds that the governmental act in question was the Defendants' decision whether or not to post the sign proposed by Mr. Di Loreto. As the Supreme Court found in *Stone*, the fact that Mr. Di Loreto's sign was to be paid for by private funds does not alleviate all Establishment Clause concerns. *Id.* at 42. Rather, posting

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[6] Plaintiff relies instead on *Lamb's Chapel v. Center Moriches Free School Dist.*, 508 U.S. 384 (1993), in which the Court found that allowing a church the same access to school premises that was provided to other community groups would not violate the First Amendment. The Court noted that the church's plans to use school facilities to show a film would not violate the Establishment clause because "the showing of the film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." *Id.* at 395. These facts are easily distinguished because, as discussed *infra*, the baseball field is essentially an extension of the classroom as it is used by students during school hours.

the sign at the District's baseball field – which is essentially an extension of the classroom insofar as it is used by students during school hours and by school-sponsored teams for extracurricular workouts, practices and competitions – would violate the first prong of the *Lemon* test because the sign does not have a primarily secular purpose. *See id.* at 41-42.

3. The Baseball Field Is a Non-Public Forum.

The Court must apply a forum analysis to determine whether the baseball field should be categorized as a public forum, a non-public forum or a limited public forum. Traditional public fora, such as streets and parks, which are regularly used for the purposes of assembly and communication among citizens, are afforded the greatest constitutional protection. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1983). Limited or designated public fora, such as municipal auditoriums and university facilities made available to the public or student groups, where the government designates a nonpublic forum for public discourse, are subject to the same strict constitutional scrutiny as public fora. *See id.* at 802. In contrast, nonpublic fora, such as military bases and prisons, which are not generally used for communication or assembly by the public, are subject to restrictions on speech that are reasonable and not viewpoint-based. *See Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

As the Supreme Court noted in *Cornelius*, the determination of whether the government has created a limited or designated public forum turns on the nature of the

property, its compatibility with expressive activity and the government's intent allowing some speech activity in a place not traditionally open to speech or assembly. 473 U.S. at 802. The Supreme Court has held that a school district designates a public forum if "by policy or practice" it opens the forum in question "for indiscriminate use by the general public." *Perry*, 460 U.S. at 47. The school's intent is the critical factor in determining the type of forum at issue: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Indeed, a finding that a school district has established a designated or limited public forum requires a showing that the school had the "clear intent to create a public forum." *Id.* at 270.

In several federal cases involving circumstances similar to those presented here, the requisite intent to create a public forum was lacking. In *Perry*, for example, because the school district did not grant general access to its internal mail system and because use of the system required permission from the principal, the Court found that the school's mail system was not a public forum. *See* 460 U.S. at 46-47. Likewise, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (plurality opinion), the Court found that the city's policy of rejecting certain types of advertising on city buses was inconsistent with a finding that the limited available advertising space was a public forum. "In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and

make reasonable choices concerning the type of advertising that may be displayed in its vehicles." *Id.* at 303; *see also Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 824 (9th Cir. 1991) (advertising space in high school newspaper, yearbook and athletic program not a public forum because school motivated by desire to raise revenue not intent to create open forum); *Brandon v. Board of Educ. of Guilderland Cent. School*, 635 F.2d 971, 980 (2d Cir. 1980) (rejecting students' effort to hold voluntary prayer sessions at school, finding "a high school is not a 'public forum' where religious views can be freely aired").

Here, because the District did not intend to open the baseball field and the outfield fence to indiscriminate use by the public, it cannot be viewed as a public forum. Rather, in keeping with the cases discussed above, the primary purpose of the outfield fence was to enclose the baseball field and its secondary purpose, under the Booster Club's advertising program, was to raise revenue for school athletic programs. Any speech activity that occurred as a result of advertising posted on the fence was purely incidental to the fence's functional and income-producing purposes. The District's decision to allow advertising at the baseball field cannot be interpreted as designating a public forum.

4. The District's Decision Was Reasonable.

Given that the outfield fence is a nonpublic forum, the Court must determine whether the District's decision to reject Mr. Di Loreto's sign was reasonable and viewpoint-neutral "Control over access to a nonpublic forum can be based on subject matter and speaker identity so

long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius,* 473 U.S. at 806. A governmental restriction on access to a nonpublic forum "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Id.* at 808.

The Supreme Court has recognized that it is reasonable for government entities to refuse to allow what some might consider controversial speech in a nonpublic forum. Particularly in a school environment, educators must be given the authority to weigh the "maturity of the intended audience" and to refuse to "associate the school with a position other than neutrality on matters of political controversy." *Hazelwood,* 484 U.S. at 272; *see also Cornelius,* 473 U.S. at 809 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum); *Lehman,* 418 U.S. at 304 ("the managerial decision to limit [advertising] space to innocuous and less controversial commercial and service oriented advertising" to avoid "the appearance of favoritism, and the risk imposing upon a captive audience" are "reasonable legislative objectives").

In *Planned Parenthood,* the Ninth Circuit held that it was reasonable for a school district to reject ads that a family planning organization sought to print in the schools' newspaper yearbook and athletic programs. The circuit found that the decision was based on a reasonable interest in maintaining neutrality on matters related to contraception and abortion, which are considered sensitive or controversial by many educators, parents and community members. 941 F.2d at 829. "Because of the possible perception of sponsorship and endorsement,

schools within the district could choose to maintain a position of neutrality on a matter of political controversy and not lend their name and resources to Planned Parenthood's advertisements." *Id.* at 830. *See also Lehman*, 418 U.S. at 303 (government acted reasonably in rejecting political ads to avoid subjecting users to "blare of political propaganda" and to avoid "sticky administrative problems" in "parceling out limited space to eager politicians").

The same analysis holds in the case at bar. It was reasonable for the District to reject Mr. Di Loreto's proposed signs because of their religious content. The District could reasonably reject all signs that were primarily religious in nature because it did not want to appear to favor one religion over another. The decision was also reasonable on the grounds that the District wished to remain neutral on the controversial issue of religious views, which many teachers, parents and community members consider personal or family matters. Just as in *Perry*, where the Supreme Court found it reasonable for a school district to refuse a non-certified union access to its internal mail system "to prevent the District's schools from becoming a battlefield for inter-union squabbles," here, the District's interest in keeping its ballfield from becoming a battleground for the promotion of religious views is equally reasonable. Furthermore, as the Defendants have testified, they were interested in maintaining a firm separation between church and state, and avoiding any litigation that might arise due to a potential violation of the First Amendment's Establishment Clause. *See, e.g., Stone*, 449 U.S. at 41-42.

Finally, because the audiences at the field are captive, the District's decision is all the more reasonable. In *Lehman*, for example, the Court found that municipal bus passengers were a "captive audience" and the city's decision to reject political advertising reasonably avoided the risk of imposing unwanted political speech on the passengers. 418 U.S. at 304.

Here, students involved in physical education classes or extracurricular sports, and community members who attend baseball games are at least as captive as passengers on a city transit system. The Attorney General opinion, adopted by Mr. Di Loreto, which asserts that students or spectators could simply avert their gaze rather than staring at the proposed sign is not persuasive. Much the same as the bus riders in *Lehman*, who presumably could have chosen to gaze out the window or shut their eyes, community members watching a baseball game or students using the field during class or as part of school athletic teams are captive. The audiences at the Downey baseball field are at the mercy of the District to exercise some discretion over what, if anything, is posted. The Court finds that it was reasonable for the District to reject Mr. Di Loreto's sign so as to avoid any appearance of favoritism; maintain its neutrality; avoid being required to open its forum to signs from competing religious viewpoints; and avoid lending its name and resources to religious speech, which some might consider controversial or inappropriate for a public school.

5. The District's Decision Was Viewpoint Neutral.

Not only was the District's decision reasonable under the circumstances presented in this case, it also did not discriminate on the basis of viewpoint. The Supreme Court has recognized a distinction between content and viewpoint discrimination. Content discrimination is that which differentiates based on the subject matter of the speech. *See, e.g., Perry,* 460 U.S. at 59 (Brennan, J., dissenting). Viewpoint discrimination differentiates based on the speaker's motivating ideology, opinion or perspective. *See Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 828 (1995).[7]"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with

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[7] In *Rosenberger,* the Supreme Court held that the University of Virginia's denial of funding to a publication whose editorial purpose was to promote a religious view improperly infringed on free speech rights and that funding the publication would not violate the Establishment clause. 515 U.S. 819. *Rosenberger* is distinguishable from the instant case because it involves speech at a university, not a high school. Because high schools act in loco parentis, they are granted considerably more control than universities over the speech to which students are exposed. *See, e.g., Hazelwood,* 484 U.S. at 270. In addition, the Court found that because the university's action was based on a regulation that expressly discriminated against publications which promote a "belie[f] in or about a deity or an ultimate reality," the university was discriminating not against religion as a subject matter but against all religious editorial *viewpoints. Id.* at 822, 831.

the intended purpose of the property." *Perry*, 460 U.S. at 49.

The record contains no evidence that the District's action was based on the views or opinion espoused by Mr. Di Loreto. As in *Perry*, there is "no indication that the school board intended to discourage one viewpoint and advance another." *Id.* at 48. Rather, Defendants have presented compelling evidence that they acted because of the religious purpose and *content* of Mr. Di Loreto's proposed speech.

Mr. Di Loreto's proposed signs contained no business designation. At no point did Mr. Di Loreto seek to use the Ten Commandments or any religious speech to promote his business, Yale Engineering. Rather, the subject matter of Mr. Di Loreto's proposed signs was plainly religious. *See Stone*, 449 U.S. at 41. The purpose of the forum was for the display of commercial speech, not religious or political or other potentially controversial speech. Because Mr. Di Loreto's proposed speech did not advertise goods or services, the District acted reasonably and without discriminating based on viewpoint in rejecting the sign due to its non-commercial content.

6. Plaintiff's Motion for Reconsideration Is Without Merit

Plaintiff has moved the Court to reconsider its May 26, 1998, Order Denying Plaintiff's Motion for summary Judgment in light of the Ninth Circuit's recent decision in *Doe v. Madison School Dist. No. 321*, 1998 WL 279221, *to be reported at* 147 F.3d 832 (9th Cir. May 27, 1998). In *Doe*, the plaintiff, on behalf of herself and her child, challenged a

high school graduation policy on student speakers. Under the policy, four student speakers are invited to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." *Id.* at *1. Under the policy the school administration could neither censor any presentation nor require any particular content. *Id.* The plaintiff sought injunctive and declaratory relief on the theory that by allowing students to inject prayers and religious speech into the graduation program, the school was perpetuating a practice of officially sanctioned religious graduation ceremonies in violation of the Establishment Clause. *Id.* The Ninth Circuit held that the policy at issue was constitutional because it neither required nor precluded students from making speeches involving religious content or a religious point of view. *Id.* at *3-5.

The Ninth Circuit's decision in *Doe* does not change the above analysis. The instant case is easily distinguished because a graduation ceremony is a one-time event, the graduation program in *Doe* contained clear disclaimers that students were solely responsible for the content of their speeches, and the decision was expressly limited to the terms of the administration's policy and the plaintiff's facial challenge. *See id.* at *6 n. 6. In contrast, Mr. Di Loreto's sign would have been posted on school grounds indefinitely, and would have been viewed during school hours and school-sponsored sporting events. In addition, the proposed sign did not contain any clear disclaimer or business designation. Moreover, Mr. Di Loreto's argument about the applicability of *Doe* is premised on his theory that the relevant government action here is the District's decision to allow advertising at its

baseball field. Having found that the government action at issue is the District's policy decision regarding whether or not to post Plaintiff's sign,[8] the Court finds that *Doe* does not control the facts of this case.

III.

CONCLUSION

For the foregoing reasons, Defendants' Motion for summary Judgment is **granted** and Plaintiff's Motion for Reconsideration is **denied.**

IT IS SO ORDERED.

DATED: August 26, 1998.

/s/ Carlos R. Moreno
Carlos R. Moreno
United States District Judge

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[8] *See* Part II.B.2. *supra.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD DI LORETO Plaintiff, v. EDWARD SUSSMAN, BETTY FERRARO, and MARGO HOFFER, Defendants.	Case No. CV 97-4028 CM **JUDGMENT** (Filed Aug. 26, 1998)

Having granted Defendants' Motion for Summary Judgment and having denied Plaintiff's Motion for Reconsideration, as set forth in the Order filed concurrently herewith,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff shall take nothing on his complaint and that the action is dismissed on the merits.

DATED: Aug. 26, 1998.

/s/ Carlos R. Moreno
Carlos R. Moreno
United States District Judge